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Under Pressure: Building Judicial Resistance to Political Interferences

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I. INTRODUCTION

The trend of the judicialisation and empowerment of courts after the Second World War has become an axiom of legal scholarship.[2] We have witnessed courts becoming more visible, more powerful and, eventually, also more political.[3] As a result, courts significantly constrain executives and function as checks against illiberal policies. The empowerment of courts has also led to substantial changes in the scope of executives' powers, removing certain areas from their political control.

It therefore hardly comes as a surprise that periods of judicialisation were followed by waves of political backlash against courts and judges world-wide.[4] While attacks on courts are not a new phenomenon and we can trace tendencies to remove non-conforming judges back to previous centuries, the court-curbing techniques employed in the last decade stand out as more frequent and more sophisticated.[5] Moreover, episodes from Central Europe demonstrate that these attacks are not isolated to non-democratic regimes. Many populist leaders[6]

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[2] G Helmke, *Judicial Manipulation in Latin America*, available at www.gretchenhelmke.com/uploads/7/0/3/2/70329843/judicial_manipulation_helmke.pdf.

[3] S Rosenbaum. 'Courts as Political Players' (2019) 8 *Israel Journal of Health Policy Research* 32; MM Taylor. 'Beyond Judicial Reform: Courts as Political Actors in Latin America' (2006) 41(2) *Latin American Research Review* 269; RB Chavez. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Standford, CA, Stanford University Press, 2004); S Gloppen and R Gargarella and E Skaar. *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London, Frank Cass, 2004); B Bugaric and M Tushnet, 'Court-packing, Judicial Independence, and Populism. Why Poland and the United States Are Different' *Verfassungsblog*, 11 July 2020, https://verfassungsblog.de/court-packing-judicial-independence-and-populism/.

[4] Helmke (n 2).

[5] D Kosař and K Šipulová, 'How to Fight Court-packing?' (2020) 6 *Constitutional Studies* 133.

[6] There are different types of populism. For the purposes of this chapter, I am using Bugaric's and Mudde and Kaltwasser's definition tying populism to anti-pluralist and illiberal politics.

do not shy away from blatant political interferences, packing the courts with loyal nominees, hijacking selection procedures[7] or attempting to discredit and delegitimise the courts in the eyes of the public.

Some of the most striking examples of the crusades against the courts come from Poland, owing to the skilful use of media by the leading party, Law and Justice (PiS). In summer 2019, the Polish news portal Onet.pl exposed the Ministry of Justice's online campaign designed to discredit a specific group of judges. In February 2020, PiS went even further, funding a new documentary series on Polish state television (also fully controlled by the government) called *Kasta*[8] (*The Caste*), which depicted judges as corrupt and incompetent. The goal of the series did not leave any room for confusion. Daily episodes broadcast for over a month picked out the most controversial judgments and episodes of judicial conduct, labelling them as hurtful, corrupt and unjust.[9] What is even more worrying, the programme received an enormous $2 million from the government and featured on billboards and in television spots with black-and-white photographs accompanied by slogans such as 'a judge stole a sausage from a shop', or 'a drunk judge found fighting in a bar'. While some of the portrayed stories were truthful, the majority were simply exaggerated.

The vibrant examples of political interference naturally spurred a lot of academic interest, exploring strategies by which political leaders rig, pack and dismantle the courts,[10] and what formal and informal safeguards can prevent them from doing so.[11] Nevertheless, very little attention has been paid so far to how courts react and what tools they have to protect themselves from imminent political attacks. The existing evidence is mostly anecdotal.[12]

This chapter bridges this gap and steps into the field with a unique study of judicial reactions to court-curbing attacks. Based on examples from Poland, Hungary, Czechia and Slovakia, it offers a systemisation of judicial resistance strategies which domestic courts have at their disposal when facing an imminent political attack, and discusses their effectiveness.

See B Bugaric, 'The Two Faces of Populism: Between Authoritarian and Democratic Populism' (2019) 20 *German Law Journal* 390; C Mudde and CR Kaltwasser, 'Studying Populism in Comparative Perspective: Reflections on Contemporary and Future Research Agenda' (2018) 51 *Comparative Political Studies* 1667; or JW Müller, *What is Populism?* (Philadelphia, University of Pennsylvania Press, 2016).

[7] Kosař and Šipulová (n 5).

[8] The derogatory title actually comes from the unfortunate occasion when Polish judges called themselves the upper caste of Polish population.

[9] See www.tvp.info/46255229/kasta, also www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/ and https://polandin.com/46515871/analysis-judging-the-judges-takes-political-centre-stage.

[10] Kosař and Šipulová (n 5).

[11] G Helmke and J Staton, 'The Puzzling Judicial Politics of Latin America: A Theory of Litigation, Judicial Decisions, and Interbranch Conflict' in G Helmke and J Ríos-Figueroa (eds), *Courts in Latin America* (New York, Cambridge University Press, 2011).

[12] For a rare exception, see Trochev and Ellet, who however focus exclusively on off-bench alliances of judges. A Trochev and R Ellett. 'Judges and Their Allies: Rethinking Judicial Autonomy through the Prism of Off-Bench Resistance' (2014) 2 *Journal of Law and Courts* 67.

The chapter proceeds as follows. Section II offers a bird's-eye view on court-curbing practices implemented in four Central European countries: Hungary, Poland, Slovakia and Czechia. Section III defines judicial reactions and proposes their categorisation, discussing various examples of individual strategies applied around the world. Section IV concludes with a suggestion that most common judicial reactions, involving invalidation of an interference, are effective only in regimes that abide by the rule of law. If executives stop respecting the principles of judicial independence, judges have to rely on more informal strategies, among which accumulation of public trust plays a vital role.

II. POLITICAL ATTACKS AND COURT-CURBING PRACTICES

Attacks on the judiciary may come from many directions, with the quality and independence of courts being scrutinised by the media or the wider public. Nevertheless, the most dangerous types of attack are those coming from the executives, who can use these attacks to get rid of an important veto player, alienate courts from citizens, dismantle courts or, at the very worst, turn courts into a weapon against their enemies. This chapter therefore concentrates on judicial reactions to political attacks.

Depending on their aim, political attacks against courts take various forms (Table 8.1). One of the most common attacks, attractive to both democratic and non-democratic executives, is court-packing.[13] Court-packing strategies aim to change the composition of the existing court by enlarging, emptying or swapping its judges, leaving the executive power with a new, loyal majority on the bench. A similar effect can be achieved by a monopolisation of judicial selection (ie absolute control and removal of veto players involved in the selection of new judges).

Another court-rigging strategy aimed at controlling the courts is delegated governance. This strategy allows political actors to keep up a pretence of judicial independence by controlling a small number of judges in top managerial positions. The low-cost technique was particularly popular in Eastern Europe during communist rule, where it secured the communist parties a high level of loyalty among judicial ranks.[14]

Some political attacks interfere with courts' decision-making more openly (politicisation), exerting direct pressure on judges in order to achieve a favourable result in high-profile cases. An example of such a politicisation strategy is 'telephone law', ie unsolicited calls in which politicians urge judges or court presidents to resolve a given case in a particular way.[15] The most recent evidence of

[13] Kosař and Šipulová (n 5).

[14] D Kosař, 'Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice' (2017) 13 *European Constitutional Law Review* 96.

[15] K Hendley '"Telephone Law" and the "Rule of Law": The Russian Case' (2009) 1 *Hague Journal on the Rule of Law* 241. See also M Popova, *Politicized Justice in Emerging Democracies: A Study of*

telephone law comes from Slovakia, which revealed a group of judges exchanging thousands of text messages with an influential oligarch currently charged with murder, corruption and tax offences.[16]

A more far-seeing invasive strategy, jurisdiction stripping, seeks completely to incapacitate and remove the courts from the decision-making process. Executives typically opt for this step if the office-stripping, ie removal of rebellious judges, is too costly or otherwise impossible.[17] An example of jurisdiction stripping may be found in the exception of any fiscal legislation from the scope of the constitutional review in the 2011 Hungarian constitution,[18] or the removal of administrative jurisdiction from the existing courts into a completely new branch of the judiciary.[19]

Finally, attacks pressuring the courts can also be implemented by other informal means, be it limiting the career options of judges after they leave the bench,[20] or steering the media against the courts with the aim of denting public confidence and trust in the courts.

Table 8.1 Types of political interference

Court-packing[21]	Expanding, lowering the number of judges or swapping judges on board
Contained selection	Monopolising the selection and appointment process
Delegated governance	Control of courts via court presidents
Jurisdiction stripping	Removal of policy arenas, restricting guidelines for review and legal interpretation, limitation of access to courts
Politicisation	Exerting pressure on the result of decisions (telephone justice, street protests, rhetorical signalling)
Other pressure	Disregarding the decision, limiting career options of judges after leaving the bench

Source: author.

Courts in Russia and Ukraine (New York, Cambridge University Press, 2012), and A Ledeneva, 'Telephone Justice in Russia' (2008) 24 *Post Soviet Affairs* 324.

[16] M Ovádek, 'Deep Rot in Slovakia' *Verfassingsblog*, 15 October 2019, https://verfassungsblog.de/deep-rot-in-slovakia/.

[17] MM Taylor, 'The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chávez' (2014) 46 *Journal of Latin America Studies*. See also L Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64 *World Politics* 587.

[18] R Uitz, 'Can You Tell when an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *International Journal of Constitutional Law* 279.

[19] The Law on the Administrative Courts – T/3353; K Than, 'Hungary to Set Up Courts Overseen Directly by Government' *Reuters*, 12 December 2018, https://perma.cc/NT9M-WZXC; ICJ, 'Hungary: ICJ Calls for Reconsideration of the Law on the Administrative Courts' (20 December 2018) https://perma.cc/U5SZ-WWAX.

[20] E Ramseyer, 'The Puzzling (In)Dependence of Courts. A Comparative Approach' (1994) 23 *Journal of Legal Studies* 721.

[21] Kosař and Šipulová (n 5).

Constitutional crises in Central Europe have brought into being all the aforementioned forms of attacks. Populist leaders such as Kaczyński and Orbán have instigated crusades against the courts, striving to strip them of powers and fill them with loyal judges, or at least to incapacitate the non-aligned ones.

Hungarian Prime Minister Victor Orbán introduced his first court-curbing proposals immediately after his overwhelming electoral win in 2010. He first monopolised the selection of constitutional justices, removing the requirement of a joint decision by the government and the opposition.[22] He then increased the number of Constitutional Court justices from eleven to fifteen, gaining a majority. The aim of his reforms was, however, not only to have a loyal Constitutional Court, but also to weaken it. The new constitution therefore stripped the Constitutional Court of the power to review any law related to fiscal policies.[23]

His next target was the Supreme Court (Kúria), whose former leader, András Baka, was a vociferous critic of Orbán. The reconstruction of the Supreme Court, although presented as a merely formal matter, cost Baka his post as court president, as the amending law presumed the renomination of all court functionaries, while simultaneously altering the conditions applying to candidates in a way that Baka, a former judge of the European Court of Human Rights, (ECtHR) clearly did not meet.[24] General courts were next in line. Through a series of smaller technical laws (such as the lowering of the retirement age of judges), he effectively packed the most senior positions with his own nominees. Finally, in 2019, he completed his assault by stripping the existing courts of a part of their agenda and creating a new branch of administrative courts.[25]

In Poland, Jaroslaw Kaczyński, the leader of the PiS, approached court-curbing in a similar fashion. Although not enjoying a constitutional majority in parliament (Sejm), he orchestrated a set of smaller reforms, monopolising the selection processes, stripping some courts of their jurisdictions, and silencing them with the threat of disciplinary proceedings.[26]

Kaczyński's arch enemy was the Constitutional Tribunal, whose jurisprudence, in his view, imposed 'blocks on government policies aimed at creating a fairer economy'.[27] The animosity between Kaczyński and the Tribunal goes back to the PiS's first government of 2006–07, when the Tribunal quashed all the legislative proposals adopted under Kaczyński's rule. In 2017, in a controversial

[22] Uitz (n 18).

[23] ibid.

[24] D Kosař and K Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v Hungary and the Rule of Law' (2018) 10 *Hague Journal on the Rule of Law* 83.

[25] Act T/8016 resurrected the attempt to install a separate branch of administrative courts from 2018, which the government originally dropped under the pressure of international organisations. For more, see R Uitz, 'EU Rule of Law Dialogues: Risks – in Context' (2020) *Verfassungsblog*, 22 January 2020, available at https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-in-context/.

[26] F Zoll and L Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland' (2019) 42 *Fordham International Law Journal* 875.

[27] B Bugaric and Tushnet (n 3).

and highly contested step, the PiS decided not to appoint three new constitutional justices legitimately selected by the previous Sejm.[28] The government subsequently paralysed the Tribunal and rendered it harmless by a combination of jurisdiction-stripping and court-packing.[29]

Kaczyński's toughest stick to beat the courts with, however, was the questionable use of accountability mechanisms. Kaczyński's minister of justice frequently initiated disciplinary proceedings against judges who opposed his policies. Moreover, the government adopted a controversial 'muzzle law', which forbade judges from reviewing the judicial independence of their newly appointed peers.[30]

The Slovak and Czech judiciaries faced a different, more informal type of court-curbing. After the division of Czechoslovakia in 1993, Slovakia fell under the semi-authoritarian rule of Vladimír Mečiar. Non-democratic tendencies targeted the courts as Mečiar attempted to control the judiciary through the Ministry of Justice and to punish any rebelling judges through disciplinary measures and financial penalties. The most flagrant example of interference happened around the 1994 dispute in which Mečiar's party attempted to annul the election of fifteen opposition deputies (which would, if successful, have left the government with the three-fifths ruling majority needed for the implementation of any constitutional change). When the Constitutional Court blocked the attempt, the government reciprocated with a set of 'saving measures', ridding the Chief Justice of the Constitutional Court of, among others, a personal driver and security.[31]

In 2003, five years after the fall of Mečiar's regime, Slovakia introduced the Judicial Council, transferring considerable powers to the judiciary.[32] However, the transition from a government-controlled judiciary to an independent one was not smooth. The old elites managed to hijack the Judicial Council and use it to capture the judiciary from the inside, staffing the most senior positions with subservient and obedient judges. The level of corruption was revealed only recently, during the investigation of the shocking assassination of a young journalist, Ján Kuciak, and his fiancée, Martina Kušnírová. The investigation pointed to an informal network between judges, high governmental functionaries and oligarchs, securing favourable judgments in proceedings relating to their economic interests.[33]

[28] The decision was in part a retaliation for illegitimate and premature selection of two more constitutional justices by the previous government. Zoll and Wortham (n 25).

[29] W Sadurski, *Poland's Constitutional Breakdown* (Oxford, Oxford University Press, 2020).

[30] THEMIS, 'Close to the Point of No Return' (2020) http://themis-sedziowie.eu/materials-in-english/close-to-the-point-of-no-return-current-situation-of-polish-judiciary/.

[31] H Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago, University of Chicago Press, 2004).

[32] S Spáč, K Šipulová and M Urbániková, 'Capturing the Judiciary from Inside: The Story of Judicial Self-governance in Slovakia' (2018) 19 *German Law Journal*.

[33] Ovádek (n 16).

Czechia has so far enjoyed top scores for judicial independence, with a relatively strong and influential Constitutional Court. There were, however, also a couple of episodes in which political groups attempted to interfere with courts' decision-making or to staff the apex court with aligned judges.[34] At the beginning of 2019, the former chief justice of the Supreme Administrative Court, Josef Baxa, and a constitutional justice, Vojtěch Šimíček, testified to the media that they had repeatedly been approached by a political advisor to President Miloš Zeman, attempting to influence their decisions in high-profile cases related to the office of the president or the selection of new judges for the Supreme Administrative Court.[35]

This mix of court-curbing techniques makes the Central European region an excellent choice for a probing study of judicial reactions to political interferences and tinkering with judicial independence. All four countries started off as young transitioning democracies. They all enjoyed some level of judicial independence. However, they also faced different forms of political attacks upon judicial independence at different stages of their regime consolidation. The exploration of judicial reactions to these political interferences therefore allows us an interesting analysis of the effectiveness of judicial resistance, depending on the type and motive of political attack.

III. CATEGORIES OF JUDICIAL RESISTANCE

Although notoriously called 'the least dangerous branch',[36] courts do have a set of tools they can use to resist political attacks. For the purposes of this chapter, I address these as 'judicial resistance', which I understand as a set of *techniques*, *tools* and *practices* which *courts or individual judges* can use to *prevent*, *avert*, *stay* or *punish imminent* political attacks on judicial independence.

Judicial resistance analysed in this chapter addresses only those responses that can be instigated by courts or judges. It does not include changes to the institutional set-up aimed at raising the level of judicial independence, or preventive measures such as tenures or judicial salaries which typically aim to shield judges from corruption or patronage. Judicial resistance can be implemented both by courts as a part of their decision-making authority, and by individual judges acting in their personal capacity. This means that judicial resistance includes both techniques and tools implemented *on* and *off the judicial bench* (Table 8.2).

[34] The most controversial example was a repeated attempt by President Klaus to remove Chief Justice of the Supreme Court Iva Brožová from office. See Kosař (n 14).

[35] O Kundra and A Procházková, 'Pozor, volá Mynář' *Respekt*, 5 January 2019, www.respekt.cz/tydenik/2019/2/vola-mynar.

[36] A Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, IN, Bobbs-Merrill, 1962).

Table 8.2 Categorisation of judicial resistance

On bench: Strategic judicial decision-making		Off-bench: Extra-judicial pressure	
Averting	Timing of decisions important to public Pivoting Delaying decisions important to government Pushback against government	**Off-bench pressure**	Organised judicial action (JU) High-risk individual judicial activism
Invalidating	(Constitutional) review of legislation *embedded competence* *derived competence* Petition to an international court for a review	**Allied pressure**	Transnational judicial networks Political opposition pressure Media pressure Academic pressure Public riots

Source: author.

On-bench resistance translates into *strategic judicial decision-making*, with which judges attempt either to *avert* the imminent looming attack by raising its costs for the political actor, or to *invalidate* it by legally quashing a political decision and proclaiming it illegal or unconstitutional.

Off-bench resistance, or *extra-judicial pressure*, refers to a set of strategies by which judges themselves engage in high-risk individual activism outside the courtroom – individually acting *off-bench*, or by *allying* with public, opposition or media.

1. Invalidation as Strategic Decision-making

The majority of judicial reactions to constitutional crises in Central Europe have occurred on a formal level, with courts using various jurisdictional tools to invalidate the political interferences of domestic governments. The great reliance on formal tools is understandable. First, it is the most direct way in which courts can make use of their decision-making competence and address assaults upon judicial independence. Second, the common characteristic of court-curbing practices implemented in Central Europe was their legal character and a pretence of constitutionality.[37]

The use of invalidation techniques depends to a large extent on the given constitutional design and the competences wielded by respective courts. All four Central European countries recognise a constitutional review of

[37] Kosař and Šipulová (n 5).

legislation vested in constitutional courts. Moreover, they all also commit to principles of judicial independence in their domestic constitutions and in international law. This opened two major forms of invalidation techniques for their judges: invalidation through domestic *(constitutional) legislative review* and *petition to a supranational court*.

An example of a judge successfully using constitutional review to protect her function is the repeated attempt by Czech President Václav Klaus to remove the Chief Justice of the Supreme Court, Iva Brožová, and replace her with his own candidate, closely linked to his former conservative party.[38] In a set of three cases initiated by Brožová[39] the Czech Constitutional Court significantly limited the competence of the president and minister of justice to interfere in 'court high politics' and arbitrarily influence and change the personal composition of the judiciary.

Courts are in more difficult situation if the executive has enough power to pass court-rigging legislation via constitutional amendments,[40] as their review requires that the principle of judicial independence is formally *embedded* in the constitution as an eternity clause. Nevertheless, many courts were recently able to *derive* unwritten eternity clauses on their own, adopting the doctrine of 'unconstitutional constitutional amendment'[41] even without an explicit textual provision.[42] For example, the Slovak Constitutional Court in 2019, amidst rising public criticism of corruption and patronage in the judiciary, struck down the constitutional amendment seeking to introduce security clearances for Slovak judges, claiming that judicial independence is the main component of the unamendable core of the Slovak Constitution.[43]

The second type of invalidation technique is available to courts in countries which locked-in the core principles of judicial independence via commitments to various international human rights treaties.[44] Favourable rulings of international courts may serve as an important signal for overly creative political leaders, impose sanctions on court-curbers and give domestic judges another layer of legitimacy.

In the European setting, the European Convention on Human Rights ('Convention') and the ECtHR in particular have long represented an important

[38] The attempts were motivated by a wish to select his own candidate, Bureš, into the position.

[39] Czech Constitutional Court, judgments no II ÚS 53/06, Pl ÚS 17/06 and Pl ÚS 87/06.

[40] As was the case in Hungary; see G Lengyel and G Ilonszki, 'Simulated Democracy in Pseudo-transformational Leadership in Hungary' (2012) 1 *Historical Social Research* 107, 108.

[41] D Landau, R Dixon and Y Roznai, 'From an Unconstitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8 *Global Constitutionalism* 40.

[42] Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (New York, Oxford University Press 2017); R Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 *Yale Journal of International Law* 1.

[43] For more detail, see Slovak Constitutional Court, judgment no Pl ÚS 21/2014 of January 30, 2019, or M Domin, 'A Part of the Constitution Is Unconstitutional, the Slovak Constitutional Court Has Ruled' *Verfassungsblog*, 8 February 2019, https://verfassungsblog.de/a-part-of-theconstitution-is-unconstitutional-the-slovak-constitutional-court-has-ruled/.

[44] On explanation of the locking-in strategy, see A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.

obstacle to violations of democratic standards, including attempts to capture the courts.[45] *Individual complaints* coming from domestic judges led to a string of rulings and pilot judgments which determined clear rules on how to structure domestic judiciaries in order to comply with the Convention.[46] The best-known example of judges seeking redress in the ECtHR is the case *Baka v Hungary*,[47] a petition of the aforementioned former Hungarian Chief Justice of the Supreme Court, András Baka, who successfully argued that the premature termination of his mandate was a retaliation for his criticism of governmental reforms. An even more interesting example is the latest ECtHR judgment *Xero Flor*, which was brought to Strasbourg by a private company arguing that one of the Polish Constitutional Tribunal justices hearing its case has not been elected in accordance with the domestic law.[48]

The Strasbourg court, however, played a less well-known role in the case of Slovak judicial independence and the attempts of the Iveta Radičová government in 2011 to break down a patronage network inside the Supreme Court. In 1997, Prime Minister Mečiar chose Štefan Harabin, the former Chief Justice of the Supreme Court, as his minister of justice. Not only did Harabin manage swiftly to polarise the judiciary, but he also vastly utilised his power to appoint close allies and friends to important positions.[49] In 2009, Harabin managed to secure his election as chairman of the newly established Judicial Council and as Chief Justice of the Supreme Court. Since then, he has purposefully used his combined functions to oversee selection processes and to threaten opposing judges.

In 2011, the new government repeatedly attempted to end Harabin's rule by the initiation of disciplinary proceedings. Nevertheless, Harabin successfully challenged the disciplinary proceedings before the ECtHR on procedural grounds, arguing that his guarantees of independence had been violated. Not only did he win the case, but he also presented the government's repeated attempts to dismiss him from the position of Chief Justice as blatant interferences with his independence in various international fora.[50] The government's efforts to dismiss Harabin were, without doubt, politically motivated. Irrespective of the moral of the story, Harabin managed to successfully use the ECtHR as a shield to protect his mandate.

A second international forum that courts can use to counter political interference is the *preliminary ruling procedure* at the Court of Justice of the European Union (CJEU). This procedure allows national judges to ask the CJEU to interpret the compatibility of new legislation with EU law. Compared to infringement proceedings initiated by the European Commission, preliminary rulings also

[45] D Kosař and L Lixinski, 'Domestic Judicial Design by International Human Rights Courts' (2015) 109 *American Journal of International Law* 713.
[46] S Trechsel, *Human Rights in Criminal Proceedings* (Oxford, Oxford University Press, 2005).
[47] ECtHR, GC judgment *Baka v Hungary* 23 June 2016.
[48] ECtHR, *Zero Flor v Poland*, 4907/18, judgment of 7 May 2021.
[49] Spáč, Šipulová and Urbániková (n 31).
[50] ECtHR, *Harabin v Slovakia* judgment, 20 November 2012.

have a time benefit: they allow domestic judges to stay existing proceedings until the CJEU has decided. This advantage was demonstrated by Orbán and Kaczyński's court-packing statutes lowering the retirement age of judges.

In 2012, Orbán proposed lowering the retirement age of judges from seventy to sixty-two years, arguing that the step would make the courts more efficient, open up positions to younger unemployed judges and cleanse the judiciary of the communist burden.[51] In effect, Orbán got rid of 274, mostly senior, higher court judges.[52] The controversial step spurred the European Commission to instigate infringement proceedings against the Hungarian government, in which the CJEU found the reviewed legislation in violation of EU law.[53] Yet, the judgment came far too late, only after targeted judges had already had to leave their posts.

In 2017, following the Hungarian example, Kaczyński also announced legislation lowering the retirement age of judges from seventy to sixty-five years.[54] The European Commission turned to the CJEU once again; nevertheless, a case was also brought before the CJEU by the national judges.[55] The CJEU swiftly issued a preliminary order[56] staying the domestic proceedings and subsequently found a violation of EU law,[57] stopping the wholesale removal of at least some of the most senior Polish judges.[58]

A downside to invalidation strategies is that compliance with the invalidation ruling still lies in the hands of the relevant government. While we can expect democratic regimes to submit to the voice of the judiciary, less can be expected from non-democratic countries, dictatorships or even populist leaders leaning towards semi-authoritarianism, as was recently demonstrated in Poland. The CJEU's finding that the change in the National Council of the Judiciary and its role in the selection of judges violates principles of judicial independence[59] provoked a rebellious answer from PiS, unheard of in the EU setting. Not only did the government openly condemn the judgment, but it also immediately issued another express law explicitly forbidding the courts from following the CJEU's ruling,[60] and eventually started disciplining domestic

[51] Kosař and Šipulová (n 5); U Belavusau, 'On Age Discrimination and Beating Dead Dogs: Commission v Hungary' (2013) 4 *CML Rev* 1145.
[52] G Halmai, 'The Early Retirement Age of the Hungarian Judges' in F Nicola and B Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge, Cambridge University Press, 2017).
[53] CJEU, *European Commission v Hungary*, C-286/12, judgment of 6 November 2012.
[54] Zoll and Wortham (n 25).
[55] CJEU, *European Commission v Poland*, C-619/18, judgment of 26 June 2019.
[56] CJEU, *European Commission v Poland*, C-619/18 R, decision of 17 December 2018.
[57] CJEU (n 52) (in relation to the Supreme Court) and *European Commission v Poland*, C-192/18, judgment of 5 November 2019 (in relation to lower courts' judges).
[58] P Bogdanowicz and M Taborowski, 'Why the EU Commission and the Polish Supreme Court Should Not Withdraw their Cases from Luxembourg' *Verfassungsblog*, 3 December 2018.
[59] CJEU, *Krajowa Rada Sądownictwa*, Joined cases C-585/18, C-624/18 and C-625/18, *A.K., CP and DO*, judgment of 19 November 2019 and CJEU, *A.B*, C-824/18, judgment of 2 March 2021.
[60] CJEU, *Commission v Poland*, C-791/19, order of 8 April 2020.

judges for further asking the CJEU to interpret the independence of their newly appointed peers.[61]

2. Averting Strategies

A second type of strategic decision-making courts can adopt is *averting* a looming political attack. If a government is threatening courts with plans for jurisdiction stripping, containing of the selection process or court-packing, courts might seek to *avert* the threat by raising the costs or lowering the benefits for the political authority, hence forcing it to backtrack. Generally speaking, courts can achieve this either by demonstrating their loyalty (*pivoting*) or by strategically *timing* their decisions and *pushback* against the government.

While we have seen many examples of *pivoting* or *strategic timing* of decisions in Latin America[62] and the United States,[63] Central European courts typically opt for much less dramatic departures from their case law and instead rely on heavy technical language.[64] This was, for example, a common practice in the Slovak Constitutional Court under Mečiar's rule. The Constitutional Court played an important balancing role, stopping the prime minister from taking a number of controversial steps and concentrating too much power in the hands of government-controlled bodies. Nevertheless, apart from a couple of instances such as the financial cuts mentioned above, it managed to slip mostly under Mečiar's radar. One of the common interpretations is that lengthy reasonings devoid of direct references to democracy or backsliding, paired with a highly technical textual interpretation, helped the court to retain the image of a relatively harmless opponent.

A different scenario played out in Czechia. Considering its power and normative influence, the Czech Constitutional Court has remained politically almost uncontested. The most invasive attempt of political power to contain it took place in 2012 when the retiring president of the country, Klaus, repeatedly refused to appoint new constitutional judges after the upper chamber of the parliament rejected his candidates.[65] Although the Constitutional Court has never shied away from vociferous statements and normative evaluations,

[61] THEMIS (n 29); L Pech, P Wachowiec, D Mazur, '1825 Days Later: The End of the Rule of Law in Poland (Part I)' (2021) *Verfassungsblog*, 13 January 2021, available at https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-i/.

[62] Helmke (n 2).

[63] The most famous being the reaction of the US Supreme Court to FD Roosevelt's 1937 court-packing plan. See GA Caldeira, 'Public Opinon and the US Supreme Court: FDR's Court-Packing Plan' (1987) 81 *American Political Science Review* 1139.

[64] Note that this practice occurred also outside of Central Europe; see, for example, the famous remark of Shapiro, who called British courts a marvellously impenetrable lump: M Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, University of Chicago Press 2013); Taylor (n 17) and J Staton, *Judicial Power and Strategic Communication in Mexico* (Cambridge, Cambridge University Press, 2010).

[65] D Kosař and L Vyhnánek, 'The Constitutional Court of Czechia' (2019) *The Max Planck Handbooks in European Public Law*, vol III: *Constitutional Adjudication: Institutions*.

a careful comparison of its case law with that of other European constitutional courts also suggests that it only rarely significantly constrained the legislator in its choices of how to amend disputed legal norms. In other words, it mostly left the discretion to create new rules to parliament.[66] It would be worth exploring whether this version of the self-contained approach helped the Constitutional Court to dodge the populist rhetoric of majoritarian difficulty.

3. Off-bench Pressure

Judicial resistance can also be used by judges in their individual capacity, without relying on their formal decision-making competence.

Organised judicial action, most often carried out through judicial unions, can often be an effective voice in advocating judicial independence. Judicial unions typically enjoy some level of official competence. They also have an access to important political networks, which allow them to issue statements and communicate more easily with the media or political opposition.[67] Examples of judicial unions actively protecting judicial independence have been seen in all Central European countries. The most striking example, however, comes from Poland. In January 2020, in a March of Thousand Robes, judges took to the streets, supported by colleagues who travelled to Warsaw from France, Norway and the Czech Republic, to protest against the PiS's policies dismantling Polish judicial independence.[68] Similarly, when the CJEU held a hearing in one of the latest ongoing cases against Poland, that hearing was attended by Dutch, Belgian and Turkish judges as a gesture of support for their Polish colleagues.[69]

Judicial activism can also take *individual* form. Judges can act on their own, depending on the practices in a given country, issuing public statements, communicating with other political actors or even marching in the streets. Public or political statements are often exerted by court presidents, as they, given their authority, have better channels for reaching the media and often enjoy a specific competence to comment officially on new legislation targeting the judiciary. This was the case with the former Hungarian Supreme Court Chief Justice András Baka, who was removed from office in retaliation for his parliamentary speeches criticising reforms proposed by Orbán.[70]

Similar professional assertiveness outside the courtroom is of particular importance in cases where political actors have limited formal avenues for

[66] K Šipulová, 'The Czech Constitutional Court' in K Pocza (ed), *Constitutional Politics and the Judiciary* (Abingdon, Routledge, 2019).

[67] D Beers, 'A Tale of Two Transitions: Exploring the Origins of Post-Communist Judicial Culture in Romania and the Czech Republic' (2010) 18 *Demokratizatsiya* 28.

[68] C Davies, 'Judges Join Silent Rally to Defend Polish Justice' *The Guardian*, 12 January 2020, www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers.

[69] J Morijn, 'Commission v Poland: What Happened, What it Means, and What it Will Take' *Verfassungsblog*, 18 March 2020, https://verfassungsblog.de/commission-v-poland-what-happened-what-it-means-what-it-will-take/.

[70] Kosař and Šipulová (n 24); *Baka v Hungary* (n 45).

asserting their authority over the judges. Nevertheless, as suggested in the case of Chief Justice Baka, off-bench pressure rather often leads to a political backlash, especially in regimes backsliding from democracy. The Polish PiS, for example, reacted to protests organised and held by unions of judges with a specific provision in the 'muzzle law' requiring judges to disclose their membership of any association, their functions in the NGO sector and their membership of any political parties before they became judges.

Similarly, the government retaliated against individual judges. A Janus-faced symbol of governmental harassment and defiance of Polish judges is the case of judge Waldemar Żurek (former spokesperson of the previous National Council of the Judiciary). While still in office at the Council, he was subjected to an eighteen-month investigation by the Central Anti-Corruption Bureau (on a fraud charge), received numerous telephone and email threats, and became a target of public harassment, which included the PiS-controlled press publishing headlines about his personal life and divorce. Professionally, Żurek was transferred against his will to a different division at the court as a punishment for alleged failures to execute his duties promptly. His appeal to the Supreme Court languished for several months until it was picked up and swiftly dismissed by a new Extraordinary Control Chamber.[71]

4. Allied Resistance

Finally, *allied resistance* comprises a set of practices and resistance techniques which can only be implemented by an alliance of the courts with their peers or other political or civil actors.

Recent court-curbing attacks in Poland and Hungary prompted large-scale activity in *transnational judicial networks*.[72] Many of the CJEU preliminary rulings targeting judicial independence in Poland and Hungary actually arrived from the courts of other Member States. The Network of Presidents of Supreme Courts of the European Union played a particularly important role. In 2012, the Network initiated a questionnaire among its members, inquiring whether it was possible to use the principle of mutual trust as a vehicle for stopping the free movement of judgments and exerting pressure on the rebelling Hungarian government. The infamous Irish preliminary question[73] was also first discussed in this forum during the Irish presidency of the Network. The Network also actively sought the help of Viviane Reding, the European Commissioner for

[71] E Siedlecka, 'To Shoot Down a Judge' *Verfassungsblog*, 8 June 2020, https://verfassungsblog.de/to-shoot-down-a-judge/.

[72] E Holmøyvik, 'For Norway it's Official: The Rule of Law Is No More in Poland' *Verfassungsblog*, 29 February 2020, https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/.

[73] CJEU, C-216/18 PPU, *Celmer*, judgment of 25 July 2018.

Justice, Fundamental Rights and Citizenship from 2010 to 2014, adding to the pressure on the European Commission to act against Hungary.[74]

Similarly, in the aftermath of the controversial Polish 'muzzle law', the German District Court of Appeal in Karlsruhe refused to extradite a person sought by the Polish authorities. The District Court reasoned that Polish courts could no longer be considered independent, as Polish judges could at any point be subjected to arbitrary disciplinary proceedings and sanctions.[75]

Apart from their international judicial peers, judges can also ally with *political opposition*, *supranational institutions*, *NGOs*, *media* or *the public*. On the supranational level, the European Commission in particular is an important ally of domestic judges, having the competence to initiate both *infringement proceedings* before the CJEU and (together with the European Parliament) the sanctioning process under Article 7 TEU. The infringement proceedings allow the CJEU to review the compatibility of domestic legislation with existing EU law obligations. The European Commission initiated three infringement proceedings against Hungary and four against Poland. The latest development, however, raises many doubts related to the effectiveness of infringement proceedings. The Polish government seems no longer to bother to comply with CJEU rulings, adopting instead a very nationalistic rhetoric. It therefore seems that while the CJEU can give domestic judges new ammunition, it can no longer on its own exert its dominance over rebelling populist governments.

Another important ally of judges is the *media*. They can report on court cases with their own independent agenda or on behalf of other actors. The investigation into the murder of Ján Kuciak in February 2018 stirred up Slovak society and eventually helped to uncover a convoluted corruption network including the mafia, entrepreneurs, politicians and very senior judges.

Coincidentally, in that very same year the Constitutional Court faced a large-scale personnel change, with nine out of thirteen justices coming to the end of their terms. The government –fearful it would lose the next parliamentary election – first tried to use the opportunity to pack the court with loyal people and secure some posts for its own party members. Public pressure and frequent media coverage, however, prevented it from doing so. In an unprecedented move, a local NGO organised a three-day-long live streaming of candidate interviews by a selection committee in Košice's main square.[76]

Independent media also played their role in the alleged attempts by the Czech president and his advisors to influence apex courts. The decision of former Chief Justice Baxa and constitutional justice Šimíček to publicise the pressure exerted by a presidential advisor gained high coverage and provoked much public

[74] Network of Presidents of Supreme Courts of the European Union, Newsletter 26/2014.

[75] T Wahl, 'Refusal of European Arrest warrants Due to Fair Trial Infringements' (2020) 4 *EUCRIM – The European Criminal Law Association's Forum* 321.

[76] M Steuer, 'The First Live-Broadcast Hearings of Candidates for Constitutional Judges in Slovakia: Five Lessons' *Verfassungsblog*, 5 February 2019, https://verfassungsblog.de/the-first-live-broadcast-hearings-of-candidates-for-constitutional-judges-in-slovakia-five-lessons/.

interest, making it very difficult for political actors to continue their activities without ramifications.[77]

As much as politicians may use public protests to pressurise the courts,[78] high public confidence may also protect judges against political interference with their independence. Frontal assaults on courts often trigger antipathy to executive power.[79] *Public riots* therefore increase the costs of political interference and may force the executive to reconsider its plan.[80] Nevertheless, the readiness of the public to riot in the streets depends to a large extent on social legitimacy, public confidence and trust in courts. This was clearly demonstrated by the Polish case, where the government benefited from overall low prestige and public antipathies towards judges for the crucial months in which it managed to sufficiently weaken the courts. Riots in the streets followed only once the PiS had interfered with rule-of-law principles in a very obvious way.

IV. CONCLUSION: CAN COURTS PREVENT POLITICAL INTERFERENCE?

This chapter has been built on an understanding that courts can prevent, avert or punish political interference by raising the costs and lowering the benefits of attacks for the executive. However, examples from Central European countries have demonstrated that they have done so with different levels of success. The study of four cases is certainly not enough to aspire to a general theory about the effectiveness of judicial resistance. It is limited to the experience of post-transitional democratic regimes partly backsliding from democracy, with at least some level of judicial independence. It also reports on the European legal and cultural setting, where supranational commitments play a much stronger role than in the rest of the world.

Nevertheless, certain patterns appearing in Poland, Hungary, Czechia and Slovakia force us to think more broadly about the potential link between forms of political interference and effective retaliation of domestic judges, which would allow the courts to move from simple incidental reactions to forming systemic judicial resistance strategies.

We have seen that neither populist nor democratic politicians shy away from court-curbing practices. However, judicial reactions and their effectiveness differ with the intensity of interference and aims followed by executives.

The Czech case, involving a democratic regime with fully independent courts, demonstrated examples of both formal and informal political attacks. These attacks did not aim to incapacitate the courts, nor did they aim to make the judiciary dependent. Instead, political actors occasionally tried to influence the

[77] Supra (n 34).
[78] Taylor (n 17).
[79] ibid.
[80] G Vanberg, 'Establishing Judicial Independence in West Germany' (2000) 32 *Comparative Politics* 333.

result of particular high-profile cases (via pressure exerted by President Zeman), award their loyal allies with prestigious positions at apex courts (via attempts to remove Chief Justice Brožová) or to slightly shift the ideological stance of the court (via attempts to influence the composition of the Supreme Administrative Court). So far, Czech courts have been able to protect their independence, either quashing problematic proposals in a constitutional review, or using the media to stir the public debate and push the executive power into a corner. In other words, judicial reactions followed the character of a political attack: formal legislative interferences met with an *invalidating strategy* before the Constitutional Court, while informal attempts at politicisation were countered by informal individual activity on the part judges and the media (*allied strategy*).

A case worthy of particular attention is the Slovak struggle to remove the former Chief Justice Harabin from his position and break down his informal network. Harabin managed to twist the principle of judicial independence and use the ECtHR as a shield against accountability. Yet, the government, aware that reform of the judiciary was conditional on Harabin's removal, backtracked after the ECtHR ruling, making his *invalidation strategy* successful. This case suggests that a democratic regime committed to rule-of-law principles can be willing to comply with international pressure even if convinced that its court-packing is for a legitimate end.

The Polish and Hungarian cases, on the contrary, show that *invalidation strategies* have little effect in countries which lack sincere commitments to the principles of judicial independence and the rule of law. Resistance in backsliding or non-democratic regimes can be costly for judges and lead to a backlash. Just think of Orbán reorganising the Supreme Court to strip his Chief Justice and biggest critic, András Baka, of his function. Or the case of Polish judge Waldemar Żurek; or scholar Wojciech Sadurski, who is being prosecuted for tweets in which he described the PiS as 'an organised criminal group'.[81]

Even supranational courts, including ECtHR and CJEU, can do little against rebelling governments. The CJEU is limited in addressing questions of judicial independence by its jurisdiction related to the application of EU law. This lack of jurisdiction has already resulted in procedural refusals of several preliminary questions of Polish judges.[82] The CJEU, however, did bite in a couple of infringement proceedings, invalidating Hungarian and Polish court-packing early-retirement laws and ordering the suspension of the new Polish Disciplinary Chamber.[83] While blatant disobedience was for decades a topic of only academic interest among European legal scholars, Kaczyński's attitude shows that times are changing and populist politicians, especially those who built their popularity around nationalism and the direct democracy narrative, do not feel threatened

[81] J Morijn and B Grabowska-Moroz, 'Supporting Wojciech Sadurski in a Warsaw Courtroom' *Verfassungsblog*, 28 November 2019, https://verfassungsblog.de/supporting-wojciech-sadurski-in-a-warsaw-courtroom/.
[82] For more on this complex problem, see CJEU cases C-558/18 and C-563/18.
[83] CJEU, case C-79/19.

by possible exclusion from the EU club – all the more so now that the United Kingdom has voluntarily left the EU.

The ECtHR is technically better equipped to hear and decide cases of judges whose independence has been violated by executive power. On the other hand, the decision-making process in Strasbourg is notoriously slow and lacks enforcement powers – even more so than the CJEU, which can, to an extent, rely on the European Commission. The question therefore is whether it can do more than to hinder partial court-curbing steps and delay the capture of the judiciary.

Despite this gloomy picture, it is important to note that both supranational courts are not completely toothless. The informal pressure which the ECtHR and the CJEU can exert on governments by organising hearings and publicly debating the problems and their repercussions should not be underestimated. More generally speaking, this suggests that *invalidation strategies* can be effective even in regimes that do not abide by the rule of law when paired with *allied* strategies, and leverage courts can find help from various judicial and non-judicial actors. Allied strategies typically have an informal character and function as an *auxiliary* measure to formal judicial resistance. A promising example is the financial pressure successfully applied to Orbán in 2012, when the International Monetary Fund made loans for Hungary conditional on its compliance with CJEU and European Commission demands, as well as the February 2020 decision of Norway's Administrative Court to withdraw from cooperation under the EEA Grants and to stop funding any justice-related issues in Poland.[84]

The examples discussed above therefore suggest that two factors are essential for the efficiency of judicial resistance. First, timely reaction of the court is absolutely crucial. Any *preventive* and *averting strategies* require vigilant courts to act before governments can actually take their steps – or at least, before they completely dismantle the rule of law. Second, *alliances* are vital for effective judicial retaliation, as courts cannot execute their own rulings and, if silenced by court-curbing legislation, need other actors to pressurise the government. *Allied strategies* are mostly of informal character and function as auxiliary measures to more formal invalidation techniques.

Nevertheless, alliances between judges and the media or public depend to a large extent on the ability of courts to garner sufficient public trust and prestige. This finding also suggests the importance of preventive strategies that courts should implement to build their relationship with the public. Although not omnipotent, public confidence can significantly raise the stakes for politicians seeking to dismantle principles of judicial independence. It could therefore be argued that long-term *preventive strategies*, aimed at increasing public confidence and public trust, should be considered a part of judicial resistance, allowing the courts to shift from incidental reactions to curbing political interferences, to meticulously planned judicial resistance strategies.

[84] Holmøyvik (n 68).

9

Transparency in the 'Fairyland Duchy of Luxembourg'

CATHERINE BARNARD*

I. INTRODUCTION

IT IS A truth universally acknowledged among Brexiters that the Court of Justice, even if in possession of a good reputation, should have no jurisdiction over the United Kingdom. As Mark Francois MP put it in his letter to Michel Barnier on 26 June 2020:

> In the spirit of honesty between friends, and for the avoidance of doubt, there can be no way that the European Court of Justice (ECJ) can be allowed to have a role in UK national life after the end of this year.

The question, then, is why is it that a court which expounds fundamental Western values – democracy,[1] the rule of law[2] and the protection of fundamental rights[3] – should have become such an object of loathing for the Brexiters. I think there are three explanations.[4]

The first concerns control by an external (unelected) body. This feeds into the broader 'take back control' mantra so powerfully advocated by the Leave campaign.[5] Returning to Francois's letter: '[A]ll I and my colleagues in the ERG[6] have ever really wanted is to live in a free country which elects its own government and makes its own laws and then lives under them in peace.' For them

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[1] See eg Case 294/83 *Parti écologiste "Les Verts" v European Parliament* EU:C:1986:166.

[2] See eg Case C-619/18 *Commission v Poland* (retirement age of judges) EU:C:2019:531.

[3] See eg *Opinion 2/13* EU:C:2014:2454.

[4] See also www.politico.eu/article/brexit-ecj-european-court-of-justice-9-reasons-why-some-brits-hate-europes-highest-court/.

[5] For a discussion as to what this might mean, see M Elliott, 'The UK–EU Brexit Agreements and "Sovereignty": Having One's Cake and Eating It?', https://publiclawforeveryone.com/2020/12/31/the-uk-eu-brexit-agreements-and-sovereignty-having-ones-cake-and-eating-it/.

[6] European Research Group, the Leave 'party' within the Conservative Party.